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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re W.P., a Person Coming Under the Juvenile
Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

W.P.,

Defendant and Appellant.

F064667

(Super. Ct. No. JW092393-00)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Peter A. Warmerdam, Juvenile Court Referee.

Candice L. Christensen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Barton Bowers, Deputy Attorneys General, for Plaintiff and Respondent.

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Welfare and Institutions Code section 1752.16¹ provides a juvenile court with the option, under certain circumstances, to order a ward of the court housed at the Division of Juvenile Facilities (DJF). Minor and appellant, W.P., contends section 1752.16 violates the ex post facto prohibitions of the state and federal Constitutions. We conclude section 1752.16 does not authorize additional punishment and is not, therefore, a prohibited ex post facto law. Accordingly, we affirm the juvenile court's order.

HISTORY

In 2007, then 13-year-old minor performed a lewd act on a four-year-old girl. He admitted a section 602 petition alleging a violation of Penal Code section 288, subdivision (a). The juvenile court declared minor a ward of the court, removed him from his foster home, placed him in the custody of a probation officer for placement in a suitable facility, and ordered enrollment in "sexual offender/sexually appropriate behavior counseling."² Minor was placed in various group homes over the next several years but continued to violate probation. In May 2011, the juvenile court committed minor to DJF.

In *In re C.H.* (2011) 53 Cal.4th 94, the Supreme Court held that a juvenile court may only commit a ward to DJF "if the ward ... committed an offense listed in section 707[, subdivision] (b) and then only if the ward's most recent offense alleged in any petition and admitted or found to be true by the juvenile court is either an offense enumerated under section 707[, subdivision] (b) or a sex offense described in Penal Code section 290.008[, subdivision] (c)." (*Id.* at p. 108.)

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² All orders of the juvenile court are rendered in our record in all capital letters. We have omitted this additional capitalization from all quotations from the court's orders.

In the wake of *In re C.H.*, *supra*, the juvenile court set aside minor's DJF commitment. After further hearing, on February 27, 2012, the court committed minor to the probation department "pending successful completion of sexual offender treatment." As a condition of probation, minor was ordered to "satisfactorily complete mental health & sexual offender counseling." He was ordered to be released on his own recognizance upon completion of the treatment program.

Section 1752.16 was then enacted as urgency legislation "to address the California Supreme Court's ruling in *In re C.H.* (2011) 53 Cal.4th 94." (*Id.*, subd. (b).) Section 1752.16, subdivision (a), provides that DJF "may enter into contracts with any county of this state for [DJF] to furnish housing to a ward who was in the custody" of DJF on the date *In re C.H.* was decided (Dec. 12, 2011) and who was committed to DJF for the commission of an offense listed in Penal Code section 290.008, subdivision (c), but who had not committed an offense listed in section 707, subdivision (b). Appellant is such a person.³

³ Section 707, subdivision (b), lists 30 serious and violent crimes which, when committed by a minor 14 years of age or older, permit proceedings to determine whether the minor should be tried as an adult for the offense. (Other related provisions require prosecution as an adult in some circumstances not relevant to the present case. (See *In re Eddie M.* (2003) 31 Cal.4th 480, 487, fn. 3.)) Section 707, subdivision (b), serves an additional purpose, however: section 731, subdivision (a)(4), at the time of minor's offense, provided that a minor adjudged a ward pursuant to section 602 could be committed to DJF only if the minor had committed an offense described in section 707, subdivision (b). While forcible lewd or lascivious conduct, described in Penal Code section 288, subdivision (b), is listed in section 707, subdivision (b), nonforcible lewd or lascivious conduct, proscribed by Penal Code section 288, subdivision (a), is not. (See *In re C.H.*, *supra*, 53 Cal.4th at p. 99, fn. 3.)

Penal Code section 290.008, subdivision (c), contains a different listing of crimes. Subdivision (a) of that statute requires that any person who is discharged after he or she has been committed to DJF based on a section 602 petition alleging any of the offenses listed in Penal Code section 290.008, subdivision (c), shall register as a sex offender. All violations of Penal Code section 288 are included in the Penal Code section 290.008, subdivision (c) list.

By order of March 29, 2012, the juvenile court modified minor's probation pursuant to section 778, over the objection of minor's counsel, to authorize the probation officer "to temporarily house the minor" at DJF, not to exceed his 21st birthday. (See § 800, subd. (a) [appealable orders].) The order for release upon successful completion of the sex offender program was continued in effect.

DISCUSSION

Minor contends section 1752.16 retroactively increases the available punishment for his 2007 offense, in violation of constitutional prohibitions on ex post facto laws. (See U.S. Const., art. I, § 10; Cal. Const., art. I, § 9.)

The state and federal ex post facto laws have the same meaning. (*John L. v. Superior Court* (2004) 33 Cal.4th 158, 171-172.) "[N]o statute falls within the ex post facto prohibition unless 'two critical elements' exist." (*Id.* at p. 172.) "First, the law must be retroactive." (*Ibid.*) Section 1752.16 is applicable to appellant solely because he was, prior to the effective date of that section, the subject of a section 602 petition charging a crime listed in Penal Code section 290.008, subdivision (c), and was serving a commitment to DJF on the date *In re C.H.*, *supra*, 53 Cal.4th 94 was decided. Accordingly, the first requirement for a prohibited ex post facto law is met.

The second requirement for a prohibited ex post facto law is that the law must have one or more of the following four effects: it makes criminal acts that were innocent when done; it makes the crime greater or more aggravated than it was when committed; it inflicts a greater punishment for the crime than was available when the crime was committed; or it alters the rules of evidence or the required proof for conviction. (*John L. v. Superior Court*, *supra*, 33 Cal.4th at p. 172 & fn. 3.)

Minor contends section 1752.16 violates the third of these prohibitions; that is, he contends section 1752.16 increases the punishment that could have been imposed upon him at the time he committed his section 602 offense. There are essentially three components to his argument. First, he says: "In the juvenile justice system, incarceration

at DJF is certainly regarded as severe punishment.” Second, section 1752.16 makes him “liable to punishment where none had been available” previously. Third, the type of housing order permitted by section 1752.16 is the same as an order for commitment to DJF, the precise punishment the Supreme Court prohibited in *In re C.H.* The Legislature, in minor’s view, simply “did not agree with the California Supreme Court ... and took swift action to ensure that punishment would be administered in the most restrictive setting.”

Respondent asserts that a “commitment to DJF is primarily rehabilitative, not punitive,” and an order directing housing at DJF does not “increase [minor’s] quantum of punishment.”

Restrictions on the minor’s liberty, whether to a local facility or to DJF, are defined by statute as “punishment,” and incarceration in most circumstances would be considered more “severe” than a fine or a requirement for community service. (See § 202, subd. (e).) For present purposes, however, the question is whether section 1752.16 inflicts greater punishment than was available at the time of minor’s offense. We conclude it does not.

Both before and after the enactment of section 1752.16, a ward could be confined in a variety of juvenile institutions run by the county (§ 730, subd. (a)) and could be ordered to “participate in a program of professional counseling as arranged and directed by the probation officer as a condition of continued custody of the ward.” (§ 731, subd. (a)(3).) In fact, in the present case, there was a brief period after minor’s DJF commitment was recalled pursuant to *In re C.H.* and prior to enactment of section 1752.16 when the court ordered confinement of minor in custody “pending successful completion of sexual offender treatment,” with release on minor’s own recognizance “upon completion” of the program. Those are precisely the same conditions of probation that the court imposed after enactment of section 1752.16, with the sole exception that the probation officer was permitted to use the sexual offender

program offered by DJF instead of the local program. In particular, the court reiterated that minor's custody continued to be only for the purpose of sexual offender treatment, and the court ordered that "[u]pon completion [of sexual offender treatment,] the minor will be released on his own recognizance." The mere fact that the state created an additional resource to provide sexual offender treatment, and that this resource was in a different location than the existing local programs, does not constitute an ex post facto increase in the punishment. (See *People v. Cruz* (2012) 207 Cal.App.4th 664, 672, fn. 8 [serving a sentence locally is not lesser punishment than serving the same length sentence in state prison for ex post facto purposes].)

For similar reasons, we reject minor's second and third contentions, that section 1752.16 is the Legislature's attempt to authorize "punishment where none had been available" previously, for the purpose of reinstating punishments declared unlawful in *In re C.H.* There are two important differences between a commitment to DJF and the housing order permitted by section 1752.16. First, a ward committed to DJF who has committed any of the wide variety of sex crimes listed in Penal Code section 290.008, subdivision (c), is required to register as a sex offender pursuant to Penal Code section 290, subdivision (b). (See *id.*, § 290.008, subd. (a).) There is no similar requirement for wards committed to the care of the probation officer for the same sexual offenses. (See *In re Crockett* (2008) 159 Cal.App.4th 751, 760 [Court accepted respondent's concession that "[j]uveniles adjudicated in California must register for a list of more serious sex offenses, and petitioner's offenses are among those requiring registration in California.... However, registration for one of the listed offenses is required only if the juvenile was also incarcerated at the California Youth Authority, now the Division of Juvenile Justice ... (DJJ)."]; see also *In re Bernardino S.* (1992) 4 Cal.App.4th 613, 619-620 [former Pen. Code, § 290, subd. (d)].) Second, after a ward is committed to DJF, the decision to release the ward from custody resides with the Juvenile Parole Board, not with the juvenile court which made the commitment. (§§ 1766, 1769;

see *In re Allen N.* (2000) 84 Cal.App.4th 513, 515-516.) By contrast—and as shown in the court’s order from which this appeal is taken—a section 1752.16 housing order leaves the decision concerning release of the ward from custody with the juvenile court judge. These two factors demonstrate that such a housing order is not merely a semantically different authorization of the same punishment declared impermissible in *In re C.H.* Instead, the section 1752.16 option does, in reality, constitute a new resource by which the juvenile court can accomplish treatment. Accordingly, there is no indication the Legislature acted with punitive intent in enacting section 1752.16. Section 1752.16 is not a prohibited ex post facto law.

DISPOSITION

The order of March 29, 2012, is affirmed. Minor’s request that we take judicial notice of documents comprising the legislative history of Welfare and Institutions Code section 1752.16 is granted.

DETJEN, J.

WE CONCUR:

POOCHIGIAN, Acting P.J.

FRANSON, J.